SERVED: November 30, 1995

NTSB Order No. EA-4406

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 14th day of November, 1995

JAMES RONALD WIELAND, and CAROLE ANN PERRY, Applicants, v. DAVID R. HINSON, Administrator, Federal Aviation Administration, Respondent.	Dockets 212-EAJA-SE-13596 213-EAJA-SE-13597

OPINION AND ORDER

Applicants have appealed from the initial decision of Administrative Law Judge William E. Fowler, Jr., served on March 13, 1995, denying applicants' request for attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504.[1] The law judge determined that, while the

[1]The initial decision is attached.

Administrator may have failed to charge respondents with a regulatory violation directed specifically at respondents' act of lying to Air Traffic Control (ATC), the Administrator nonetheless was substantially justified in bringing the enforcement action against respondents. As discussed below, we deny applicants' appeal and affirm the initial decision.

The Administrator issued the emergency orders of revocation to respondents based on the following undisputed facts. As pilot-in-command and first officer of USAir flight 565, a DC-9, on February 22, 1994, respondents operated a passenger-carrying flight that departed from Washington National Airport and was scheduled to land at Logan International Airport, Boston, Massachusetts. The aircraft was not refueled before departure, a fact that the crew did not discover until 25 minutes into the flight, about 30 miles southwest of Kennedy International Airport, Jamaica, New York. At that point, Captain Wieland directed First Officer Perry to contact ATC at La Guardia Airport, Flushing, New York and request clearance for an emergency landing. He further instructed First Officer Perry, after ATC had inquired about the nature of the emergency, to tell the controller that there was a problem with one of the aircraft's engines. When ATC then asked how much fuel was on board, First Officer Perry stated (at Captain Wieland's direction) that they had 6,000 pounds of fuel.[2]

[2]As was discussed in NTSB Order No. EA-4190 at 3, the flight plan indicated that the aircraft should have had 14,500 pounds of fuel on board at take off, but actually left the gate with 6,400

The Board, in NTSB Order No. EA-4190 (served June 7, 1994), sustained only part of the charges in the Administrator's orders and found that respondents' violations did not warrant revocation for several reasons.[3] First, the record did not support the Administrator's assertion that respondents' misrepresentation of the nature of their emergency resulted in careless or reckless operation of an aircraft because the Administrator failed to prove that ATC would have handled the situation any differently had the controller known the true reason for the emergency. In addition, the Board determined that the Administrator offered no evidence other than the investigator's opinion to support his interpretation of FAR section 91.183(c), namely, that the requirement to keep ATC informed of a flight's progress encompasses a requirement to accurately describe the nature of an emergency, and further found that Respondent Wieland fulfilled

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pounds. The law judge found that the aircraft landed with only 1,250 pounds of fuel on board. While we acknowledged that respondents' estimate of 2,000 pounds of fuel upon landing might be correct, we did not disturb the law judge's finding. Id. at 5, n.6.

[3]Both respondents were charged with violating the following FARs: 91.13(a) and 121.535(f) for careless and reckless operation of an aircraft; 91.167(a) and 121.639 for operating an aircraft under instrument flight rules without sufficient fuel to reach the intended destination, to an alternate airport, and then another 45 minutes; and 121.315(c) for failing to follow approved cockpit check procedures. Respondent Wieland was also charged with violating 91.103, 91.183(c), and 121.557(c) for failing, as pilot-in-command, to become familiar with the fuel requirements of the flight, to report by radio information related to the safety of the flight, and to keep ATC informed of the progress of the flight during an emergency. 14 C.F.R. Parts 91 and 121. In NTSB Order No. EA-4190, the Board affirmed all the charges except the 91.183(c) and 121.557(c) charges against Respondent Wieland.

his obligation under FAR section 121.557(c) to keep ATC informed of the flight's progress.[4] Id. at 9. Since the violations that ultimately were sustained appeared to have been inadvertent, and did not evince a lack of qualifications, respondents were eligible to take part in the Aviation Safety Reporting Program (ASRP), and thus permitted a waiver of sanction.

The EAJA Application

Under the EAJA, the government must pay certain attorney fees and costs to a prevailing party unless the government establishes that its position was substantially justified, or that special circumstances would make an award of fees unjust. 5 U.S.C. § 504(a)(1). In order to be substantially justified, the Administrator's position must be reasonable in both fact and law. Thus, the facts alleged must have a reasonable basis in truth, the legal theory propounded must be reasonable, and the facts alleged must reasonably support the legal theory. U.S. Jet v. Administrator, NTSB Order No. EA-3817 at 2 (1993); Pierce v. Underwood, 487 U.S. 552, 565, 108 S.Ct. 2541 (1988). This standard is less stringent than that applied at the merits phase of the proceeding, where the Administrator must prove his case by a preponderance of the reliable, probative, and substantial evidence. Accordingly, the FAA's failure to prevail on the merits does not preclude a finding that its position was

[4]The Administrator's interpretations of FAR sections 91.183(c) and 121.557(c), we found, were "unsupported by any evidence of their reasonableness (such as prior statements or interpretations), and are patently inconsistent with the plain language of these sections." Id. at 9.

nonetheless substantially justified under the EAJA. See U.S. Jet, supra, at 3; Federal Election Commission v. Rose, 806 F.2d 1081, 1087 (D.C. Cir. 1986).

In their appeal, the applicants contend that the Administrator acted without substantial justification when he alleged that respondents' misrepresentation to ATC was a careless or reckless act that further endangered the flight. The facts as alleged did not support revocation, they continue, and the Administrator should have realized this and accepted their offer to settle the case. As explained below, we disagree.

To evaluate this EAJA appeal, we must first determine whether the applicants are prevailing parties. Undoubtedly, the dismissal of two charges against Captain Wieland and the significant reduction in sanction against both applicants resulted in a substantially favorable outcome for them. The dispositive issue in the instant case remains whether the Administrator was substantially justified, at each stage of the case, in pursuing revocation of the applicants' Airline Transport Pilot (ATP) certificates. However, it does not necessarily follow that we must isolate the issues upon which they prevailed to determine whether the Administrator's position was substantially justified.[5] Instead, it is imperative to review

[5]See, e.g., Roanoke River Basin Ass'n v. Hudson, 991 F.2d 132 (4th Cir. 1993), cert. denied, 114 S.Ct. 182 (1993), where the court, when explaining that, in an EAJA case, the government's case should be examined using a broadly-focused analysis, stated:

[W]hen determining whether the government's position in

the Administrator's actions in context.

The question of whether the Administrator was substantially justified in seeking revocation can only be answered by looking at all the facts and then determining whether, given those facts, the Administrator was justified in attempting to prove that applicants' qualifications were in doubt. The Administrator was faced with a situation where two ATP certificate holders, who are held to the highest degree of care, had failed to adequately check the fuel level before taking off on a commercial passenger-carrying flight and then made several deliberately false statements to ATC and their own company personnel, in an apparent attempt to cover-up their mistake. Although there was no precedent directly on point, deliberate misstatements in logbooks and other required written records have long resulted in revocation for a certificate holder. See, e.g., Administrator v. Lee, Hill, and Bergren, NTSB Order No. EA-4260 (1994); Administrator v. Cassis, 4 NTSB 555, 557 (1982), aff'd, 737 F.2d 545 (6th Cir. 1984). In addition, the deliberate misstatements can reasonably be viewed as bearing on whether the respondents

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> a case is substantially justified, we look beyond the issue on which the petitioner prevailed to determine, from the totality of circumstances, whether the government acted reasonably in causing the litigation or in taking a stance during the litigation. In doing so, it is appropriate to consider the reasonable overall objectives of the government and the extent to which the alleged governmental misconduct departed from them.

Id. at 139.

exhibit good moral character, an attribute they must affirmatively demonstrate to be eligible to hold ATP certification. See 14 C.F.R. § 61.151(b).

It is understandable that the Administrator would take the position that intentional false statements made to FAA personnel by an airman regarding the nature of an inflight emergency would call into question an airman's qualifications. Further, an airman's willingness to intentionally misrepresent to ATC the nature of an inflight emergency is obviously a situation that the Administrator would, and should, take seriously. Cf. Administrator v. Eden, NTSB Order No. EA-3932 (1993) (revocation upheld for pilot who, among other things, falsely represented to ATC that he had minimum fuel, thus obtaining priority treatment).[6] The Administrator identified applicants' apparent intent to mislead ATC as a compelling indicator of the applicants' lack of qualifications.[7] Given the underlying facts, the Administrator's decision to seek revocation does not appear to reflect the kind of judgment the EAJA was designed to deter.[8]

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[6]In Eden, we found that respondent's behavior showed a "disregard for the complexities of the ATC system." Id. at 11.

[7]In fact, the Administrator noted that had this been only a fuel mismanagement case, he would have agreed to a 150-day suspension. Administrator's Brief, EAJA Appeal at 24. The deliberate misstatement to ATC, however, called the applicants' qualifications into question. Id.

[8]Even if the Administrator was not substantially justified in this action, we believe that this case presents "special circumstances [that would] make an award unjust." EAJA statute, 5 U.S.C. § 504(a)(1).

Although the Administrator did not succeed in showing, by a preponderance of the evidence, that respondents' act of lying to ATC about the origin of an inflight emergency could have endangered life or property, it does not automatically follow that the Administrator was not substantially justified in trying to make that argument. We believe that the Administrator was substantially justified in asserting the theories that supplying ATC with false information was incompatible with the respondents' obligation under the FARs to keep ATC informed of the flight's progress and that the requirement to report information relating to the safety of a flight necessarily includes a requirement to truthfully report the nature of all inflight emergencies. Consequently, we find that the Administrator was substantially justified in pursuing this action.

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicants' appeal is denied; and

2. The initial decision denying the application for an EAJA award is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.